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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

EDWARD A. BLOTTEAUX, AN INDIVIDUAL,
PETITIONER

v.

QANTAS AIRWAYS LIMITED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an issue of international importance for protection of air travelers, including United States citizens traveling abroad, not addressed by this Court in *Olympic Airways v. Husain*, 124 S. Ct. 1221, 1229 (2004):

Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

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OPINIONS BELOW

Petitioner seeks review of the opinion rendered herein by the United States Court of Appeals for the Ninth Circuit which is unreported is the Ninth Circuit No. 03-56837. A copy of the Memorandum is reproduced in the Appendix as, (1a-6a)[1]. The order of the United States District Court for the Central District of California is also unreported. A copy of the document is reproduced in the Appendix as, (7a-15a).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on March 1, 2006. The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Convention for the Unification of Certain Rules Relating to International Transport by Air, Oct. 12, 1929, 49 Stat., part II, p. 3000, TS No. 876 (1934), reprinted in 49 U.S.C. § 40105 (1997) ("The Warsaw Convention or Act")[2]

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[1]Citations to the Appendix to the Petition as _a.

[2]The Warsaw Convention has been amended by the Agreement Relating to the Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB 18900, approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25 September 1975, ratified by the United States 1998 reprinted in S. Exec. Rep. No. 105-20 (1998). These amendments do not affect Article 17.

Article 17 or the Warsaw Act states:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24(1) of the Warsaw Act states:

In the cases covered by articles 18 and 19 any action for damages, however unfounded, can only be brought subject to the conditions and limits set out in this Convention.

Article 24(2) of the Warsaw Act states:

In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

STATEMENT

Petitioner developed DVT[3] while he was traveling as a fare paying passenger on Qantas Airways flights 615 and 26 from Cairns, Australia bound for Los Angeles, California through Auckland, New Zealand, on September 2, 2001. (8a). International airline passengers, such as Mr. Blotteaux, are especially at risk for developing DVT in flight because travel at high altitudes for long durations increases the blood's coagulability, slowing blood flow and causing it to pool in the lower legs. (10a-11a). Immobility, cramped and restricted small seat pitch, compression of the thighs on the seat edge, stagnant recycled air, and dehydration due to the cabin's low humidity levels contribute to the pooling and clotting, seriously affecting circulatory process, causing venous thromboembolism, or DVT. As a clot grows, it casts off smaller clots that can move to the heart and into the arteries of the lungs, blocking blood flow and depriving the body of oxygen. In some instances, the clot travels to the brain, causing a stroke.

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[3]Deep Vein Thrombosis (DVT) and its associated condition, venous thromboembolism are extraordinarily dangerous conditions associated with high morbidity and mortality. In fact, the World Health Organization considers the risk of DVT associated with long duration air travel, to be so significant that it has commissioned an international study of that health hazard and how to reduce the risk. (*See also*, T.N. Bettes, M.D. and D.K. McKenna, M.D. Medical Advice for Commercial Air travelers, *American Family Physician*, Vol. 60, pp. 801-10 (September, 1999); Medical Advice for Airline Passengers, *Aerospace Medical Assoc.*, at Page 11 (May, 2002); R.S. Hughes, M.D., et al., Frequency of Venous Thromboembolism in Low to Moderate Risk Long Distance Air Travelers, the *New Zealand Air Travelers Thrombosis Study*, The Lancet, Vol. 362, pp. 2039-44 (January, 2003).

(9a-10a).

At no time before September 26, 2001, had Petitioner heard of DVT being associated with long duration air flight. He did not know prior to the flight that conditions in the aircraft could cause this life threatening medical condition. Qantas failed to provide any adequate information to Mr. Blotteaux identifying DVT as a risk associated with long duration air travel, and failed to direct him to any information concerning steps to be taken to reduce or eliminate the potential DVT risk. (3a).[4]

Petitioner developed DVT requiring hospitalization, due to his immobility during the course of the subject flights and from the passenger cabin environment within Respondent's aircraft. Incontrovertible medical evidence also shows that it was more probable than not that Mr. Blotteaux would

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[4]Qantas claims that for six months prior to the subject trip it had a policy of showing a video during the course of their flights, a portion of which mentioned DVT. (11a). Qantas does not present any evidence establishing that it showed the video on the flights at issue. Qantas does not present evidence that had the video been shown, that passengers in business class (including the Petitioner) were directed to a channel appropriate for viewing. The Petitioner, conversely, declared that he did not see the video during his flights on September 26, 2001. (3a). Additionally, the Petitioner did not read the "in flight" magazine, said by Respondent to contain a DVT advisory. Respondent failed to produce any evidence stating that it directed the Petitioner to read the "in flight" magazine for important safety and health instruction, without which the Petitioner was left to guess where appropriate safety and health information (if any) would be located among the plethora of other reading and entertainment materials available to the Petitioner aboard Respondent's aircraft.

not have developed the medical conditions during Respondent's flights had he remained adequately hydrated and periodically walked or performed exercises in his seat during the flight. (10a-11a).

Petitioner showed that, long before the flight, air carriers knew of the risk of DVT to passengers on long international flights. Since 1954 reports in medical literature have linked air travel with DVT and pulmonary embolism. (*See*, J. H. Scurr, M.D., *Traveler's Thrombosis*, the Journal of the Royal Society for the Promotion of Health, Vol. 122. (March 2002)) A number of reports appeared in medical literature, suggesting an increased incidence of DVT among passengers who have recently flown, **perhaps in as many as 1 in 10.** Conditions contributing to increased susceptibility to developing DVT include immobility in flight, decreased air pressure, relative hypoxia in the flight cabin, and dehydration. (See, B. Eklof, M.D., et al., Venous Thromb-embolism in Association with Prolonged Air Travel, Dermatol Surg., 1996, 22:637-641)

The International Air Transport Association ("IATA"), an international commercial aviation industry trade organization of approximately 275 members including Qantas, instructed its members as early as 1986 to provide passengers with warnings about DVT. The instructions were reiterated in 2001, recommending that passengers be advised of the condition at the time of ticket purchase. In 1996, the Air Space Medical Association, participated in by Qantas's medical director, published its guidelines describing how carriers should address DVT exposure risks to their passengers. As part of this plan, by the time of the Petitioner's flight, many international

airlines had already implemented a program designed to meaningfully instruct and inform passengers about DVT. However, on flights 615 and 26, on September 26, 2001, the Respondent failed to adequately warn the Petitioner about DVT, and as a result, the Petitioner developed a life-threatening medical condition during the course of the flight. (2a, 9a).

The Petitioner brought suit in Federal District Court seeking relief under Article 17 of the Warsaw Act. The District Court granted summary judgment in favor of the Respondent, ruling that the Petitioner's development of DVT failed to qualify as an "accident" under Article 17. The Ninth Circuit affirmed.

In so ruling, a panel of the Ninth Circuit held that (1) no "accident" under the Warsaw Convention could have occurred with respect to an airline passenger's development of DVT under normal flight conditions, and (2) there is no factual basis that Qantas failed to adequately warn Mr. Blotteaux about the dangers of DVT, or that any clear industry standard against which Qantas's warnings could be measured against existed. Thus, the Court did not decide whether an airline's failure to warn of DVT, and the consequent DVT injury, can constitute an accident for purposes of Article 17.

In the view of the Ninth Circuit, merely because materials concerning DVT were provided, despite Qantas's failure to direct Mr. Blotteaux's attention to those materials, Mr. Blotteaux's failure to heed those materials does not support any failure to warn on the part of Qantas. Further, the Ninth Circuit viewed that the Petitioner did not demonstrate any clear industry

standard against which the Respondent's warnings could be measured, despite the Respondent developing a warning video, audio, and text, and being aware of IATA recommendations. (11a).

The Ninth Circuit erroneously analogized Petitioner's disabling injury to that addressed in *Air France v. Saks*, 470 U.S. 392 (1985), solely because the Respondent's flight took off, flew, and landed as planned. The Ninth Circuit wrongly concluded that Petitioner's development of DVT resulted from nothing other than his own internal reaction to the prolonged sitting/inactivity attendant to any lengthy flight. The Ninth Circuit dismissed the analogy to *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004), by stating that Petitioner's failure to ask for assistance makes it distinct from *Husain*. However, that assumption would require the passenger to already know that immobility and dehydration during a long international flight under normal flying conditions poses a dangerous and fatal risk to as many as 1 in 10 passengers, and as a result of that knowledge ask for assistance in ameliorating it.

Contrary to the Ninth Circuit's interpretation, *Husain* turns on two prongs: (1) whether the air carrier had knowledge of the risk to a passenger, and (2) whether the air carrier assisted the passenger in ameliorating that risk. *Husain* involved a lack of response by a flight crew to a passenger's known medical condition, similar to the Respondent's lack of an adequate warning to its passengers regarding avoiding DVT risk. The Petitioner's level of knowledge of the high possibility of some of its passengers developing DVT due to flight and cabin conditions

aboard the Respondent's aircraft, is the same as a flight crew's level of knowledge of an asthmatic passenger's susceptibility to sitting near a smoking section. The Petitioner's failure to advise the Respondent of his need for specific DVT safety instructions is irrelevant and absurd in the analysis.

The Ninth Circuit erred in stating that the Petitioner had no factual basis to argue whether an airline's failure to warn of DVT can constitute an "accident" for purposes of Article 17, an issue left open for discussion by the Ninth Circuit in *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914, 919 (9th Cir. 2004). When contradictory evidence exists, it is for the trier of fact to decide whether an "accident," as defined under Article 17, caused the passenger injury. *Saks* at 405-406. The facts are disputed as to whether the Petitioner saw a video warning, whether a video was shown, and whether the Petitioner was given any other information and warning regarding DVT by the Respondent on the flight from Auckland to Los Angeles. (5a-6a). Further, the Petitioner was not directed to audio programming by the Respondent advising of DVT risk. Lastly, the Respondent failed to direct the Petitioner to written DVT risk warning contained toward the back of the "in flight" magazine. (10a).

Declarations and other supporting evidence submitted on behalf of Petitioner provided substantial unrebutted evidence establishing a connection between the Petitioner's injury and Respondent's operation. The Ninth Circuit was compelled to view the evidence in light most favorable to the Petitioner, and could not weigh the parties' evidence. *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 245 (1986). The evidence should be submitted to the trier of fact for resolution.

REASONS FOR GRANTING THE PETITION

I. IT IS IMPORTANT FOR THIS COURT TO DETERMINE THAT THE IN FLIGHT DEVELOPMENT OF DVT BY AN INTERNATIONAL PASSENGER RESULTING FROM THE CARRIER'S FAILURE TO ADEQUATELY INFORM ABOUT THAT RISK IS COMPENSABLE UNDER ARTICLE 17 SO AS TO IMPROVE AIR CARRIER OPERATIONS AND PROTECT INTERNATIONAL PASSENGERS FROM THE HEALTH CONSEQUENCES OF CARRIER DECISIONS.

This Petition concerns an issue both of national and international significance regarding the application and scope of the term "accident" as used in the Warsaw Act, and directly questions whether the Act will continue to provide meaningful protection for the international air traveling public.

The question raised has global significance because the opinion of the Ninth Circuit potentially jeopardizes the safety of all passengers on international flights. The Ninth Circuit opinion undercuts the well-recognized fundamental purpose of the Act, which is to provide international passengers with compensation where a carrier's operations are causally connected with a passenger's injury. The purpose of the Act was not only to foster the development of, at the time, fledgling airline industry by achieving uniformity of

rules governing claims, but also to balance the interests of injured passengers in receiving prompt recovery for personal injuries with the interest of carriers seeking to limit potential liability. *See, Generally,* Richard Gardner, "The Warsaw Convention at Three Score Years and Ten," 24 *Air and Space,* L. 114 (1999); *El Al Israel Airlines, Ltd. v. Tseng,* 525 U.S. 155, 169-170 (1999). The Ninth Circuit decision gives a Federal Court imprimatur to an industry decision to withhold vital health and safety information from passengers, compounded by that industry's refusal to affirmatively act on a hazard about which most international passengers are ignorant.

Now, commercial aviation is an established industry and the countervailing balance of the international passenger's needs has changed. "Protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve." *Wallace v. Korean Airlines,* 214 F.3d 293, 296-297 (2d Cir. 2000). The Warsaw Act promotes passenger safety by ensuring that air carriers remain responsible for maintaining safe operations to benefit the welfare of their passengers. It is internationally recognized that airlines should have incentives to promote the safety and security of their passengers. *Maxwell v. Aer Lingus Ltd.,* 122 F.Supp.2d 210, 214 (D.Mass 2000); *Salerno v. Pan Am World Airways, Inc.,* 606 F.Supp. 656 (S.D.N.Y. 1985).

The subsequent amendments to the Act, embodied in the Montreal Accords, resulted in the signatory carriers consenting to a liability system under which they assumed "virtual strict liability" for death or injury to passengers. These amendments

were made, in part, at the behest of the United States, aiming to assure our citizens of adequate protection in the event they sustain injury on an international flight. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34-37 (2d Cir. 1975).

The United States, dissatisfied with the old liability limits, invoked Article 39 of the Convention and filed a notice of its intent to denounce the Act of 1965. Senator Robert F. Kennedy cogently articulated the concerns of the United States underlying its planned denouncement: "Over two million Americans travel annually on international flights. Assuring that their families are adequately protected in case of accident is, consequently, a matter of wide-spread importance...no one questions the fact that the protection now afforded to international travelers is woefully inadequate." *Id.* At the conference in Montreal, in February 1966, one day before the United States denunciation was to become effective, a compromise was brokered. Within the compromise was an agreement on the part of the carriers to waive the "all necessary measures" defense. *Id.* As a result, the Act is now seen as affording protection for all passengers from hazards of air travel, spreading the cost of that protection among them. *Id.* at 36-37. By waiving the defense of due care, liability under the Act had become considered strict under modern tort theories, although not totally absolute. *Fulop v. Malev Hungarian Airlines*, 175 F.Supp.2d 651 (S.D.N.Y. 2001).

Thus, the passenger protection purpose of the Act, and the public policy considerations it serves, form an integral part of the analysis regarding the proper

scope and application of the Act. An evaluation that ignores these subsequent developments of the Act would revert the Act to its 1929 incarnation, at the infancy of air travel, and ignore new dangers posed to air travelers fostered by technological changes in the industry over the intervening 77 years. Today, millions of people annually experience commercial air travel at altitudes exceeding 30,000 feet for periods longer than 16 hours, while the risks of aviation have changed dramatically in ways unforeseeable in 1929 by the Warsaw Convention delegates. Nonetheless, the original drafters intended to create a system of liability and compensation rules to cover all hazards of air travel. *Day v. Trans World Airlines, supra*, 528 F.2d at 38.

The Ninth Circuit's ruling leaves as many as ten percent of international air travelers who develop DVT without remedy. These injuries result directly from the refusal of air carriers to provide fare-paying passengers with either adequate accommodations, or - at a minimum - the health and safety information known to the carriers. Rather than serving the drafters' desire to create an inclusive system, the Ninth Circuit's ruling frustrates it. Since air travel is an evolving endeavor, with longer flight times and attendant risks, the definition of "accident" must remain current in order to retain any relevance to the original goal of protecting fare-paying passengers.

The ruling encourages air carriers to forego even minimal health and safety presentations and warnings to its international air passengers, rather than spread the small cost of such warnings equally among all passengers, as originally intended by the Act. To

protect air passengers, the traditional interpretation of "accident" must be understood to include passenger injuries that are shown to have a causal connection to carrier operations and decisions. Sudden and unexpected development of DVT is linked to carrier operations and decisions. The Ninth Circuit's denial of compensation is therefore antithetical to a meaningful interpretation of the term "accident" under Article 17.

Passengers seeking to hold a carrier liable for an injury occurred during an international flight must demonstrate under parameters of Article 17 that (1) there was an accident, in which (2) a passenger suffered death, wounding, or bodily injury, and (3) the accident took place on board an aircraft, or in the course of embarking or disembarking. *Eastern Airlines, Inc. V. Floyd*, 499 U.S. 530, 535-36 (1991). The term "accident" was not defined by the drafters.

This court first addressed the meaning of that term in *Air France v. Saks, supra*, 470 U.S. 392 holding that the concept of "accident" must be "flexibly" applied after assessment of all the circumstances surrounding a passenger's injury. To properly implement that flexible interpretation, this Court stated, "liability under Article 17 of the Warsaw Convention arises only if the passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405.

This Court further assured that the passenger's right to compensation would be assured by requiring that "accident" be broadly interpreted, to wit: "any injury is in a product of a chain of causes, and we require only that the passenger be able to prove that a

link in the chain was an unusual or unexpected event external to the passenger. Thus, while an 'accident' must cause a passenger's injury, it need not be the sole causal factor." *Id.*

Recently, this Court applied the concept of "accident" so as to protect international passengers from injuries arising from failure of crew members to respond to known health needs of a passenger. *Olympic Airways v. Husain, supra,* 124 S.Ct. 1221. This Court, in *Husain* decided that an omission, failure to respond to information, could satisfy the requirements of an "unexpected" or "unusual" event or happening.

This Court knew that whether an event or happening connected in some way with carrier operations is "unexpected" or "unusual" must be evaluated from an objective perspective. (See, e.g. *Fulop v. Malev, supra,* 175 F.Supp.2d at 670-672.) From that perspective, the majority of this Court found absolutely no distinction under Article 17 between carrier acts and carrier omissions that cause injury to passengers. This Court, in *Husain,* declined the carrier's suggestion that it consider ambient cigarette smoke in the cabin as a normal condition of flight. This Court also refused to hold that the preexisting sensitivity of the decedent to cigarette smoke was relevant or conclusive to a carrier's Article 17 liability. Instead, this Court found determinative the fact that the crew was aware of the passenger's sensitivity, but nonetheless did not act on that information when accommodation was available.

Applying the *Saks* and *Husain* criteria to the

facts in this case leads inexorably to the conclusion that, since a causal relationship exists between Petitioner's flight-related medical emergency and the Respondent's knowledge of the danger and subsequent inaction (10a-11a), the requisite nexus exists for Petitioner to be compensated under Article 17. Qantas was and is aware of the risk of DVT to which thousands of its passengers are exposed to annually. Qantas was also aware of steps to be taken to prevent DVT risk exposure to its passengers (10a-11a).

Despite the available information, the Respondent failed to meaningfully act to inform its passengers of the risk. Instead, the Respondent placed the information about DVT in the back of its "in flight" magazine, or on an unspecified audio channel. (10a-11a). The Respondent made no meaningful effort to inform the Petitioner regarding important information about DVT and that it could be found in the back of the "in flight" magazine, or on a particular audio channel. (10a).

Additionally, Respondent claims to have addressed the DVT risk on an in-flight video. (11a). However, the video was never shown the Petitioner, nor was he directed on what channel to find the video at his business-class seat. Thus, Qantas broke with its own practice of showing the safety video on the flight. Even if the video was actually shown, Qantas failed to direct the Petitioner to the appropriate channel, amounting to not dissipating the relevant safety information at all. Thus, Mr. Blotteaux was left guessing as to where, if at all, he may find safety information regarding a dangerous medical condition that he was unaware of, but the airline was. Just as Olympic Airways's failed response to information

regarding Dr. Husain's medical susceptibility was "unexpected" or "unusual," so too must the Respondent's failure to warn the Petitioner regarding susceptibility to DVT on long international flights be considered objectively "unexpected or "unusual."

Application of the *Saks* and *Husain* explanation of an "unexpected or unusual event," coupled with an analysis of the causal relationship between the event and airline operations, reveals that Petitioner's injury is compensable under Article 17. Mr. Blotteaux's development of DVT is wholly related to cabin conditions and Qantas's decision to inadequately inform and advise its passengers of DVT risk. (10a-11a). The record is uncontroverted that Mr. Blotteaux did not have DVT prior to boarding the flight. His injuries were wholly caused during flight, by the conditions created and decisions made by Qantas regarding its operations. Further, evidence presented by Petitioner reflects that DVT is far from an unforeseeable idiosyncratic reaction limited to the peculiarities of a particular passenger. (9a-11a). Rather, its incidence in international passengers is as high as ten percent. The Respondent does not and cannot produce any expert evidence refuting the connection between DVT and the flight-related risk that has been well-known to air carriers for almost 30 years. (9a-11a).

In order to encourage air carriers to meaningfully promote passenger safety, this Court should recognize that failure to warn of DVT risk constitutes an "accident" under Article 17. Thus, carriers would provide health and safety information to air passengers, informing them on steps to take to minimize health and safety risks. Air carriers would

not be unduly burdened by assuring that all passengers, who pay their fare, ride on the carrier, but lack knowledge about DVT risk, are informed of the risk and any preventative measures. An air carrier is uniquely able to control the dissemination of health related information to its passengers. Once the carrier fails to adequately inform its passengers of DVT risk, the Act's intent to impose the standard of "virtual strict liability" for injuries occurring in course of international flight is subverted.

This Court should take the opportunity to reinforce the protective aspects of the Warsaw Act by holding carriers responsible under Article 17, when it is shown that their decision to withhold information from the traveling public resulted in serious bodily injury.

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THIS COURT ON AN IMPORTANT QUESTION REQUIRING RESOLUTION BY THIS COURT.

A. *Contrary to the Conclusion Below, a Passenger Injury Due to a Carrier's Failure to Adequately Inform Its Passengers of a Serious Safety Risk Associated With Conditions of Air Travel (A Risk Known to the Carrier But Not Its Passengers), Satisfies the Saks and Husain Model for an Article 17 "Accident."*

The Ninth Circuit erroneously analogized Petitioner's disabling injury to that addressed by this Court in *Air France v. Saks*, *supra*, 470 U.S. 392,

because the Respondent's flight took off, flew, and landed as planned. Under this faulty paradigm, if a passenger suffers an injury causally related to the carrier on an otherwise "normal" international flight, an "accident" may only be found if that passenger informed a crew member of a health concern before he or she is stricken, and then only if the crew member's response to that information violates a "clear" industry standard or policy. However, this standard would require the passenger to already know that by taking the flight he or she is exposed to a potentially fatal risk - - and therein lies the whole point of the DVT litigation domestically and internationally. The Petitioner did not know he was at risk because the Respondent was uniquely situated to inform him of it, but failed to adequately do so.

The record here is entirely distinguishable from *Saks*. *Saks* stands for the proposition that since nothing unusual happened on an otherwise "normal" flight, and the condition and injury suffered was internal to the passenger, the airline had no reason to anticipate or act on the risk. Thus, it would not be considered objectively "unusual" or "unexpected" if a carrier did not act upon information it neither had, nor had reason to anticipate. In the present case, the Respondent knew of the hazard to all of its passengers, but failed to give an adequate warning regarding it.

The facts in the present case are entirely consistent with this Court's pronouncement in *Olympic Airways v. Husain*, *supra*, 124 S.Ct. 1221. In *Husain*, the crew was informed of a passenger's medical sensitivity. The air carrier failed to properly act on the information to prevent the injury. This Court found

that an omission may satisfy the requirement of an "unexpected" or "unusual" event. A majority of This Court found absolutely no distinction under Article 17 between carrier acts and omissions, if a passenger injury results. Had the airline not had the information regarding the medical condition, it would not have been required to act. In the present case, the Respondent had extensive information regarding the medical condition and risk of DVT. Similar to *Husain*, the Respondent failed to appropriately act by not giving an adequate warning to prevent the Respondent's injury.

The discussion in *Husain* addressed a record that presumed the existence and breach of an "industry standard and airline policy." The same result would be obtained following the *Husain* analysis, where the carrier is indisputably aware of a risk to which thousands of its passengers are exposed to annually, and the carrier fails to adequately warn of the risk, especially since the Respondent acknowledges developing videos, audio, and print materials regarding the risk. (ER 292-293). This scenario must be considered to be objectively "unexpected" or "unusual," since the carrier had specific information and procedures, yet failed to implement them. Certainly from the innocent injured person's perspective, the carrier's failure to take action to obviate a risk it was aware of would be both "unexpected" and "unusual."

The passenger in *Husain* had a medical susceptibility to conditions on the flight - the proximity of the smoking section negatively affected his asthma. The air carrier was aware of the susceptibility of the passenger to these flight conditions, yet omitted to act to prevent the asthma attack. Similarly, the

Respondent was aware of the susceptibility of its passengers to DVT. The susceptibility of air passengers to DVT directly results from the characteristics of the Respondent's cabin compartment combined with extended flight time of international flights. Despite the knowledge of the danger posed by the flight conditions, the Respondent failed to adequately warn the Petitioner of the danger of developing DVT on the flight.

In its ruling below, the Ninth Circuit noted that Qantas had a standard practice to show a video on the risk of DVT. (10a). Thus, there was a standard airline policy in the present case unlike in *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914, 917 (9th Cir. 2004), where the Ninth Circuit stated that a violation of a "clear industry standard or airline policy" is required before an omission will be considered "unexpected" or "unusual." Instead of determining that proof of a violation of industry or airline policy would make Qantas's failure to warn "unexpected" or "unusual," the Ninth Circuit misinterpreted *Rodriguez*. In the present case, the Ninth Circuit oversimplified *Rodriguez* to stand for the proposition that the "occurrence of DVT on an otherwise unremarkable flight does not constitute an accident." (5a).

Even if this Court is to take this simplistic definition on its surface, the flight in question would not be considered "unremarkable" since the Respondent "unexpectedly" failed to follow its own standard practice of showing the DVT warning video, or adequately directing the Petitioner toward it. A standard policy of educating passengers regarding safety risks associated with the flight is quite

ineffective if the passengers are not adequately informed by the air carrier of where to find that information.

B. *The Petitioner's Development of DVT was Related to the Respondent's Operations.*

It is beyond any reasonable dispute that "cause" under Article 17 is to be expansively construed. There need be only some link in the injury producing "unusual" or "unexpected" event that was external to the passenger. *Air France v. Saks, supra,* 470 U.S. at 406; *Maxwell v. Aer Lingus,* 122 F.Supp.2d 210 (D.Mass 2000).

"All injury is the product of a chain of causes" and the passenger need only prove "some link in the chain was unusual or unexpected event external to the passenger." *Saks, supra,* 470 U.S. at 406. The claim in this litigation pertains to air carrier accommodations and the services provided to passengers. It is accepted that services provided by flight attendants to passengers during flight is a characteristic of air travel having a positive relation to the operation of the aircraft. *Tsevas v. Delta Airlines,* (N.D. Ill.) 1997 WL 767278. Since providing information to passengers is a vital service provided by the air carriers and their employees, the omission by the air carrier when it refrains from providing even adequate safety and health information regarding the cabin environment on a flight directly relates to the carrier's conduct in its operations.

As shown in the record, the Petitioner's DVT

developed due to cabin conditions and due to the Respondent's failure to adequately and meaningfully advise, inform, educate or warn its passengers. (9a-11a). Under *Saks*, an "accident" need not be the sole cause of the injury, but only has to be a link in the causal chain. *Saks, supra*, 470 U.S. at 406. The Petitioner's exposure to cabin conditions, combined with the Respondent's failure to adequately warn of the danger and furnish vital health and safety information created such a causal link. Thus, paraphrasing *Fulop*, Mr. Blotteaux's "injury may be causally traced to the carrier's fateful choice[s] and represented an 'external' factor that brought about at least the particular...injury here in contention." *Fulop v. Malev Hungarian Airlines, supra*, 175 F.Supp.2d at 671.

A requisite nexus between carrier operations and passenger injury is met where, as here, substantial evidence is presented to support a conclusion that a carrier failed to meaningfully respond to information of a known risk. Once a relationship exists between the Petitioner's injury and the Respondent's operations, the injury becomes compensable under Article 17, consistent with this Court's instructions in *Saks* and *Husain*. Accordingly, the purpose and intent of the Warsaw Act is fulfilled, as originally presented and as amended pursuant to the United States' requirements of adamantly preserving the safety and security of international passengers.

The Ninth Circuit distinguishes the present case by citing *Rodriguez* and its narrow interpretation of *Husain*. The Ninth Circuit states that because *Husain* involved a response by a flight crew to a medical condition, and *Rodriguez* did not, the present case is

identical to *Rodriguez*. This interpretation is too narrow to be practical, as courts would then have to carve out individual exceptions to any response not identical to *Husain*, rather than set a straightforward rule for air carriers to follow. The interpretation argued for by the Petitioner would save judicial and private resources by avoiding future litigation regarding various exceptions, and uphold the intent of the Warsaw Act.

C. *Lower Court Decisions in the Present Case, as well as in Rodriguez and Blansett Both Ignore the Supreme Court's Admonition Against Inserting Common Law Principles Into Article 17 Analysis, and They Conflict, Thus Creating a "Catch 22" for International Passengers Who Develop DVT.*

The Ninth Circuit opinions in the present case and in *Rodriguez v. Ansett Australia, Ltd.*, *supra*, 383 F.3d 914, and the Fifth Circuit decision in *Blansett v. Continental Airlines, Inc.*, *supra*, 379 F.3d 177, both improperly inject common law concepts of standards and policies into their discussion of an "accident." The Ninth Circuit premised its opinions upon the injured passenger's inability to establish a violation of a "clear industry standard or airline policy," or to "demonstrate any clear industry standard against which Qantas's warnings could be measured in any event" at the time of the flight to warn about DVT risk. *Rodriguez, supra*, 383 F.3d at 918. (6a). The Ninth Circuit, however, neglected to address whether the Respondent's departure from its own standards could objectively be considered "unexpected" or "unusual."

The Fifth Circuit in *Blansett* ignores evidence of the violation of industry standards in existence in 2001, concluding that the failure to warn was not "unusual" or "unexpected" because the warnings provided complied with regulations issued by the Federal Aviation Administration. *Blansett, supra*, 379 F.2d at 182. The Fifth Circuit, therefore, limits the determination of what is "unusual" or "unexpected," insofar as an international carrier's failure to warn, to whatever is required by the FAA at a particular point in time. As such, the Fifth Circuit authorizes the FAA to determine compensability under the Act. This rationale is faulty, because, while the FAA may establish minimum standards for international flights arriving in or departing from the United States, it does not have the power to set standards for the interpretation of international treaties, such as the Warsaw Convention. The FAA sets only the absolute minimum standards for domestic and international carriers to abide. Air carriers may still be found liable for act or omissions that meet or exceed the FAA minimum requirements. However, the Fifth Circuit's opinion could, lead to different applications of the definition of "accident" in failure to warn claims, diverging from the intent of the Warsaw Convention to create standards protecting passengers.

Blansett's reference to Federal Aviation Regulations is contravened by a lack of any indication of Congressional intent to preempt the field of international carrier warning practices. (See, e.g., *Charas v. Transworld Airlines*, 160 F.3d 1259 (9th Cir. 1998).) Moreover, federal regulations only describe a carrier's minimum response. They do not provide a carrier with a complete defense. *In Re Air Disaster at*

Lockerbie, Scotland on December 21, 1988, 37 F.3d 804, 815 (2d Cir. 1994). Where federal law, as here, creates only a floor, preemption will not be found. *Geier v. American Honda Motor Corp.*, 529 U.S. 861, 867 (2000).

All of these opinions' analyses of Article 17 are deficient and contrary to *Husain* since they each use common law concepts to determine what is "unexpected" and "unusual" as a matter of law. The opinions base their conclusions on industry standards or federal regulation. Although reference to such standards may be instructive concerning what might objectively be considered "unexpected" or "unusual," such evidence cannot reasonably be considered conclusive. Adopting the Ninth Circuit's view would allow a carrier to delineate and control its own liability under the Act by simply not adopting a standard, or selectively choosing to follow one.

The lower Circuit decisions presume that a carrier's compliance with negligence-based common law principles of standards and/or regulations is dispositive of Article 17 liability. However, there is no reason in the history of the Act, or the Supreme Court's pronouncements from *Saks* and *Husain*, to support a determination that an injury arising from an industry's failure to establish or implement a standard to respond to a known risk should not also be compensable, regardless of what the FAA may or may not require.

Determination of whether an airline's failure to address a known risk to thousands of passengers is "unexpected" or "unusual," and thus an "accident," must turn on an objective evaluation "after assessment of all the circumstances." *Saks*, *supra*, 470 U.S. at 405;

Fulop, supra 175 F.Supp.2d at 670; *Maxwell v. Aer Lingus, supra*, 122 F.Supp.2d at 211. In some instances, this inquiry may be informed by "industry norms, internal policies and procedures, and general standards of care." *Fulop*, 175 F.Supp.2d at 665. However, the absence of carrier policies, standards, or FAA regulations must not be allowed to relieve a carrier of its responsibility under the Act for a passenger injury caused by a carrier's conscious refusal to adopt, implement, or perform a standard.

CONCLUSION

In order to protect the safety of international air travelers, to secure uniformity as to this important issue of international law and to resolve important conflicts between the decision below and the decisions of other Circuits as well as this Court, plenary review is in order.

Respectfully submitted,

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(any footnote(s) trail end of each document)

No. 03-56837

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD A. BLOTTEAUX, an individual, Plaintiff-Appellant,

v.

QANTAS AIRWAYS LIMITED, Defendant - Appellee, and UNITED AIRLINES, INC., Defendant.

February 15, 2006, Submitted, Pasadena, California

March 1, 2006, Filed

COUNSEL: Clay Robbins III, Magana, Cathcart & McCarthy, Los Angeles, California, for the plaintiff-appellant.

Rod D. Margo, Scott D. Cunningham, Condon & Forsyth, LLP, Los Angeles, California, for the defendants-appellees.

JUDGES: Before: B. Fletcher, Callahan, Circuit Judges, and England, District Judge

Edward A. Blotteaux ("Blotteaux") appeals the district court's grant of summary judgment in favor of Qantas Airways Limited ("Qantas") on grounds that Blotteaux's development of Deep Vein Thrombosis ("DVT") fails to qualify as an accident compensable under the terms of Article 17 of the Warsaw Convention[1]. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's judgment.

A grant of summary judgment is reviewed de novo. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005). Interpretation od the Warsaw Convention, a multilateral treaty governing the liability of air carriers engaged in international transportation, is a question of law also subject to de novo review. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 993 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003).

On or about September 26, 2001, Blotteaux developed DVT, a condition in which blood clotting forms in the deep veins of the legs, while seated in business class aboard an international flight operated by Qantas between Australia and the United States. It is undisputed that the flight in question was uneventful, with no equipment malfunction or other anomaly occurring. It is further undisputed that Blotteaux did not request any assistance or other accommodation from Qantas personnel during the course of the flight, and while he does claim to have noticed some leg discomfort as the trip progressed, Blotteaux did not seek any medical treatment for some thirteen days after concluding his air travel.

The susceptibility of airline passengers to development of DVT, particularly on long flights, is well recognized. It is undisputed that Qantas developed an informational video on the risks of DVT, and precautionary measures to be taken in the face of that risk, for use on long-haul flights. Qantas' standard custom and practice, since March 2001, has been to show its informational video on all international flights, including the flight at issue. In addition, it is undisputed that the Qantas in-flight magazine, which was available on Blotteaux's flight, contained an article cautioning passengers on the risk of developing DVT on long flights. Finally, Qantas' in-flight audio entertainment system included a segment about the importance of maintaining blood circulation during such flights.

Blotteaux makes two primary arguments in appealing the judgment below. First, he argues that the term "accident," which triggers liability for bodily injury under Article 17 of the Warsaw Convention, should be interpreted flexibly in order to allow recovery for his DVT-related damages. Secondly, Blotteaux contends that he was not provided with any meaningful warning as to the risk of DVT, and argues that Qantas' failure to adequately warn in that regard subjects the airline to liability under the Warsaw Convention. As set forth below, neither contention has merit.

Article 17 of the Warsaw Convention makes international air carriers liable for bodily injury sustained by a passenger "if the accident so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018. Liability under Article 17 therefore hinges in the present matter in whether or not Blotteaux's

development of DVT constitutes an "accident", as that term has been defined.

In *Air France v. Saks*, 470 U.S. 392 (1985), the Supreme Court addressed the definition of "accident" for purposes of assessing Article 17 liability because it resulted from "the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.* at 406. In order to trigger liability, the Court required that a passenger's injury be "caused by an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405.

The rationale of Saks applies squarely to this case. No evidence has been presented that anything unusual occurred aboard the Qantas flight in question, or that Blotteaux's development of DVT was triggered by anything other than his own internal reaction to the prolonged sitting/inactivity attendant to any lengthy flight. Blotteaux nonetheless argues that the reasoning of a subsequent Supreme Court decision, *Olympic Airways v. Husain*, 540 U.S. 644 (2004), should extend to the present matter.

In *Husain*, the airline was held liable for a passenger's fatal asthma attack after the flight attendant repeatedly refused to move the passenger out of the proximity of the plane's smoking section, despite numerous requests from the passenger's wife that an allergy to cigarette smoke made that move imperative. *See Id.* at 647. The Court found that the attendant's refusal to assist the passenger was an unusual and unexpected event that satisfied the "accident" requirement of Article 17. *Id.* at 646.

The present case is factually distinguishable from *Husain* because it is undisputed that the flight personnel were not asked to assist Blotteaux in any way and were not even notified of any discomfort on his part. Moreover, in *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914 (9th Cir. 2004), this court unequivocally found that the occurrence of DVT on an otherwise unremarkable flight does not constitute an accident because, pursuant to *Saks*, the condition was precipitated not by any unexpected or unusual event or happening but instead by the passenger's own internal reaction to normal flight conditions. *Id.* at 917. *Rodriguez* distinguishes *Husain* on grounds that it involves a response by flight crew to the passenger's medical condition, a distinction equally applicable here. *Id.* at 918. Consequently, with respect to an airline passenger's development of DVT under normal flight conditions, we have already decided that no "accident" under the Warsaw Convention could have occurred.

Blotteaux's second argument is equally unavailing. He contends that Qantas failed to meaningfully inform its passengers about the risk of developing DVT on long-haul flights, and argues that such a failure can be analogized to the "accident" identified by the Supreme Court in *Husain*. As *Rodriguez* makes clear, however, *Husain* involved a response by the flight crew to the passenger's medical condition, a circumstance not present in this case. *Id.* The only question left open by *Rodriguez*, given our statement there that we need not decide the issue, is whether an airline's failure to warn of DVT can constitute an accident for purposes of Article 17. *See Id.* at 919.

There is no factual basis here for Blotteaux's claim that

Qantas failed to adequately warn him about the danger of DVT. Since both video, audio, and written materials concerning DVT were provided, the fact that Blotteaux failed to heed those materials does not support any failure to warn on Qantas' part. In the face of those warnings, Blotteaux's claim that Qantas somehow "hid" the risk of developing DVT is simply untenable. Moreover, Blotteaux has failed to demonstrate any clear industry standard against which Qantas' warnings could be measured in any event. In the absence of a viable failure-to-warn claim, this case is squarely controlled by *Saks* and *Rodriguez*.
AFFIRMED.

Footnote(s)

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000.

No. CV 03-927-JFW (Shx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

EDWARD BLOTTEAUX -v- QANTAS AIRWAYS LIMITED, et al.

September 5, 2003, Decided

September 8, 2003, Entered

COUNSEL: For Edward Blotteaux, Plaintiff: Clay Robbins III, Magana Cathcart & McCarthy, Los Angeles, California

For Qantas Airways Limited, Defendant: Rod D. Margo, Scott D. Cunningham, Evan K. McNamara, Condon & Forsyth LLP. Los Angeles, California

JUDGE: PRESENT: HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

OPINION BY: JOHN F. WALTER

OPINION: CIVIL MINUTES - - GENERAL

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On July 25, 2003, Defendants United Airlines, Inc. ("United") and Qantas Airways Limited ("Qantas") filed separate Motions for Summary Judgment. On August 4, 2003, Plaintiff Edward Blotteaux filed his

Oppositions. On August 18, 2003, United and Qantas filed separate Replies. The Court found the matter appropriate for submission on papers without oral argument. *See* Local Rule 7-15 (the Court may dispense with oral argument on any mater unless otherwise required); Fed.R.Civ.P. 78. The matter was, therefore, removed from the Court's August 25, 2003 hearing calendar and the parties were given advance telephonic notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Facts and Procedural Background

On September 8, 2001, Plaintiff traveled from Chicago, Illinois to Los Angeles, California on United Flight No. 111. (UF P2.) Plaintiff remained in Los Angeles overnight to visit with his sister. (*Id.* at P3.) On September 9, 2001, Plaintiff traveled from Los Angeles to Auckland, New Zealand on Qantas Flight No. 26 (*Id.* at P4.) Plaintiff was seated in business class while traveling with Qantas. (*Id.* at P5.) On September 11, 2001, Plaintiff traveled from Auckland to Cairns, Australia on Qantas Flight No. 616. (*Id.* at P6.) While in Cairns, Plaintiff visited with his father and went sightseeing, swimming, and snorkeling. (*Id.* at P7.) Plaintiff remained in Cairns until September 26, 2001, at which time Plaintiff traveled from Cairns to Brisbane, Australia on Qantas Flight No. 615. (*Id.* at P8.)

In Brisbane, Plaintiff boarded Qantas Flight No. 25 bound for Los Angeles, through Auckland, New Zealand. (*Id.* at P9.) As the flight progressed, Plaintiff felt increasingly uncomfortable and struggled to

position himself to alleviate his discomfort. (*Id.* at P11.) Plaintiff felt pressure on the back of his left calf due to the position of the leg rest and attempted to adjust the leg rest throughout the flight. (*Id.* at PP12-13.) Although Plaintiff noticed a painful swelling behind his knees upon arriving in Los Angeles, he did not report the pain to a Qantas employee and did not seek treatment from any medical practitioner while in Los Angeles. (*Id.* at PP14-15 & 17.) There was nothing usual about the operation of the aircraft during Qantas Flight No. 25 and there was no malfunction of any equipment or component of the aircraft, including any seat in which Plaintiff was sitting while he was on board the aircraft. (*Id.* at PP26-28.)

Plaintiff visited with his sister in Los Angeles for a couple of days, and, on September 28, 2001, Plaintiff boarded United Flight No. 114 from Los Angeles to Chicago. (*Id.* at PP16 & 18.) After arriving in Chicago, the pain in Plaintiff's leg gradually became worse. (*Id.* at P19.) On October 9, 2003, thirteen days after his travel with Qantas was completed, Plaintiff sought medical treatment from Dr. Thometz. (*Id.* at P20.) That same day, Plaintiff was admitted to Swedish Covenant Hospital and diagnosed with deep vein thrombosis ("DVT") and a pulmonary embolism. (*Id.* at P22.) DVT is a condition in which a blood clot forms in the deep veins of the legs. (Scurr Decl. P15; Exh. 13 to Robbins Decl.) Complications occur when the clot, or part of it, which has formed in the veins breaks away or "embolizes" from the wall of the vein in the legs. (UF P25.) If the embolus reaches a blood vessel through which it cannot pass, it blocks the vessel. (*Id.*) Such a blockage is called an embolism. (*Id.*)

Qantas provides all passengers on all flights with in-flight magazines. (De Rome Decl. P3.) The September 2001 issue of Qantas' in-flight magazine, "The Australian Way," which was available to Plaintiff on Qantas Flight No. 25, provides as follows:

> When you're sitting upright and inactive for a long period of time, several things can happen:
> - The central blood vessels in your legs can be compressed, making it more difficult for blood to get back to your heart.
> - Muscles can become tense, resulting in backaches and a feeling of excessive fatigue during, and even after, your flight.
> - The normal mechanism for returning fluid to the heart can be inhibited, and gravity can cause the fluid to collect in your feet resulting in swollen feet after a long flight.
> - Some studies have concluded that prolonged immobility may be a risk factor in the formation of Deep Vein Thrombosis (DVT). Particular medical conditions may increase the risk of formation of blood clots if associated with prolonged immobility.
>
> Medical research indicates that factors which may give you an increase risk of blood clots in the legs include:
> - personal of family history of DVT
> - recent surgery or injury, especially to lower limbs or abdomen
> - blood disorders leading to increased clotting tendency
> - immobilization for a day or more

- increasing age above 40 years
- oestrogen hormone therapy, including oral contraceptives
- pregnancy
- tobacco smoking
- former or current malignant disease
- obesity
- dehydration
- heart failure
- varicose veins

> If you fall into any of these categories or you have any concerns about your health and flying, Qantas recommends you seek medical advice before traveling.... While inflight, move your legs and feet for three or four minutes per hour while seated and move about the cabin occasionally. Do the light exercises that we recommend below and which feature on the inflight entertainment system. (Exh. A to De Rome Decl.)

Qantas also created a video advising passengers about DVT and the precautions that passengers should take during a flight to prevent the development of DVT. (Exh. A to Freedman Decl.; Freedman Decl. PP2-4.) Since March 2001, it has been standard custom and practice for Qantas to show the video on all of its international flights, including Qantas Flight No. 25. (*Id.*)

Plaintiff has stipulated that he developed DVT while traveling on Qantas Flight No. 25, prior to traveling on United Flight No. 114.[9] (Stipulated Facts P8.) Plaintiff has also stipulated that he did not request aid or inform

any employee of United that he needed medical attention during United Flight No. 114. (*Id.*)

II. Standard

Summary Judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 256 (1986). A party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

An issue is genuine if evidence is produced that would allow a reasonable jury to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.* 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Electrical Service*,

Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 631-32 (9th Cir. 1987). In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (internal quotations omitted).

In ruling on a summary judgment motion, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* 477 U.S. at 249. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions..." *Id.* at 255.

III. Discussion

Plaintiff argues that Qantas and United should have warned him about the risks of developing DVT and that their failure to warn constituted an accident for purposes of Article 17 of the Warsaw Convention. 49 Stat. 3000 (1934); T.S. 876 *reprinted in* 49 U.S.C. §40105. Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Accordingly, in order to prevail on his complaint

against Qantas and United, Plaintiff must prove that an "accident" was the cause of his injury. *Air France v. Saks*, 470 U.S. 392, 396 (1985). The United States Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405. In addition, the Court stated "when the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406.

In this case, there is no evidence that Plaintiff developed deep vein thrombosis from an unexpected or unusual event or happening that was external to Plaintiff. *See, e.g., Margrave v. British Airways*, 643 F.Supp. 510, 512 (S.D.N.Y. 1986) (holding that "extended sitting in an airplane, even in an uncomfortable position, cannot properly be characterized as the sort of 'accident' that triggers an airline's liability under the Warsaw Convention"); *Scherer v. Pan American World Airways, Inc.*, 387 N.Y.S.2d 580, 581 (1976) (finding "no 'accident' as a matter of law" where the plaintiff alleged "bodily injury (namely, thrombophelitis), resulting from merely 'sitting' aboard a Pan Am flight from Tokyo to California"). As a result, Plaintiff has failed to demonstrate that an "accident" was the cause of his injury as that term is used in the Warsaw Convention and defined by the Supreme Court in *Saks*.

In addition, even if Plaintiff could prove that he developed DVT from an unexpected or unusual event or happening, his claim against United would still fail because Plaintiff stipulated that he did not develop

DVT on a United flight. (Stipulated Facts P8.) Accordingly, Plaintiff cannot prove the United was the cause of his injuries. *See, e.g., McCaskey v. Continental Airlines, Inc.*, 159 F.Supp.2d 562, 574 (S.D.Tex. 2001) (holding that "[o]nce a passenger has proved that an accident occurred aboard the aircraft or during the operations of embarking or disembarking, the passenger must also establish causation").

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Motion For Summary Judgment.

IT IS SO ORDERED

The Clerk shall serve a copy of this Minute Order on all parties to this action.

Footnote(s)

0.1. Pursuant to the Court's recommendation, Plaintiff and United stipulated to certain facts for purposes of United's summary judgment motion. *See* Stipulation Re Facts On Which Summary Judgment Is To Be Determined ("Stipulated Facts") attached as Exh. A to Statement of Uncontroverted Facts And Conclusions Of Law lodged by United on July 28, 2003.

(2)

Supreme Court, U.S.
FILED
JUN 30 2006
OFFICE OF THE CLERK

No. 05-1516

In the Supreme Court of the United States

EDWARD A. BLOTTEAUX,

Petitioner,

v.

QANTAS AIRWAYS LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

"Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an 'accident' within the meaning of Article 17 of the Warsaw Convention."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, respondent Qantas Airways Limited ("Qantas") states that it has no parent companies and no company owns more than 10% of its stock.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is unofficially reported at *Blotteaux v. Qantas Airways Limited*, 2006 WL 475458, 29 Avi. Cas. (CCH) 17,477 (9th Cir. March 1, 2006). The opinion has not been officially reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on March 1, 2006. The jurisdiction of this Court is invoked by petitioner pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. *See* Rule 10 of the Rules of the United States Supreme Court. A petition for a writ of certiorari will be granted only for compelling reasons. *Id.* Petitioner fails to offer any compelling reason why the Court should grant his petition.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. *Id.* Petitioner seeks review in this Court of the Ninth Circuit's factual finding that respondent adequately warned petitioner about the risks associated with developing DVT during international air travel. The Court recently denied a petition for writ of certiorari that was submitted on identical grounds as are presented here. *See Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914, (9th Cir. 2004), *cert. denied*, 544 U.S.

922 (March 21, 2005) (No. 04-970).[1] Petitioner has failed to offer any compelling reason why the Court should grant review in this case.

In light of the foregoing, and as more fully set forth below, the Court should deny petitioner's petition for writ of certiorari in its entirety.

ARGUMENT

I. PETIONER'S PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT DECLINED TO GRANT A PETITION FOR WRIT OF CERTIORARI SUBMITTED ON IDENTICAL GROUNDS

In *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No. 04-970), this Court denied a petition for writ of certiorari submitted on identical grounds as are presented by petitioner here.

In *Rodriguez*, the Question Presented to the Court by the petitioner was:

> Does an international carrier's failure to warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk

---

[1] Significantly, the Question Presented and the arguments contained in the *Rodriguez* petition are almost identical to the Question Presented and the arguments set forth in the petition here. This is no coincidence as petitioner's counsel in *Rodriguez* is petitioner's counsel in this matter.

> which is known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

See Petition for Writ of Certiorari, p. i, in *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No. 04-970).

In this case, the Question Presented is:

> Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

See Petition for Writ of Certiorari, p. I.

Not surprisingly, the petitioner in *Rodriguez* asserted similar, if not identical, arguments in support of her petition as petitioner asserts here. This Court declined to grant review in *Rodriguez*. Accordingly, as in *Rodriguez*, the Court should deny the petition for writ of certiorari here.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER SEEKS REVIEW OF THE NINTH CIRCUIT'S FACTUAL FINDINGS

Petitioner asks this Court to review the Ninth Circuit's factual findings.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. *See* Rule 10 of the Rules of the United States Supreme Court.

As has been set forth above, petitioner presents the following question to the Court:

> Does an international carrier's failure to adequately warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

See Petition for Writ of Certiorari, p. i.

Petitioner's Question Presented assumes that there was factual evidence below that Qantas, the "international carrier," failed to adequately warn its passengers of the risks associated with developing deep vein thrombosis ("DVT") during air travel. Petitioner's assumption runs contrary to the Ninth Circuit's factual findings below. The Ninth Circuit specifically held that:

> There is no factual basis here for Blotteaux's claim that Qantas failed to adequately warn him about the danger of DVT. Since both video, audio, and written materials concerning DVT were provided, the fact that Blotteaux failed to heed those materials does not support any failure to warn on Qantas' part. In the face of those warnings, Blotteaux's claims that Qantas somehow "hid" the risk of developing DVT is simply untenable.

See Petition for Writ of Certiorari, Appendix at 5(a) - 6(a).

Since the Ninth Circuit expressly found that there was no factual basis for petitioner's claim that Qantas failed to adequately warn him about DVT, this Court need not review whether "an international carrier's failure to warn its passengers of a risk of death or serious bodily injury associated with certain conditions of air travel . . . constitute an 'accident' within the meaning of Article 17 of the Warsaw Convention."

Based on the above, to the extent that petitioner is asking the Court to review the factual findings of the Ninth Circuit, the petition for writ of certiorari should be denied.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioner seeks this Court's review of the Ninth's Circuit's decision below on the grounds that the Ninth Circuit's decision is in conflict with this Court's decision in *Olympic Airways v. Husain*, 540 U.S. 644 (2004). *See* Petition for Writ of Certiorari, pgs. 17-26. Petitioner's argument is incorrect.

In *Olympic Airways v. Husain*, 540 U.S. 644 (2004), the airline was held liable for a passenger's fatal asthma attack after the flight attendant repeatedly refused to move the passenger out of proximity to the airplane's smoking section, despite numerous requests from the passenger's wife, who indicated that an allergy to cigarette smoke made that move imperative. *See Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004). This Court found that the flight attendant's refusal to assist the passenger was an "unusual" and "unexpected event" that satisfied the "accident" requirement

of Article 17 of the Warsaw Convention and, therefore, the airline was liable for the passenger's death. *Id.*

The present case is factually distinguishable from *Husain* because it is undisputed that in this case flight personnel were not asked to assist petitioner in any way and were not notified of any discomfort on his part. *See* Petition for Writ of Certiorari, Appendix at 2a.

In *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (March 21, 2005) (No. 04-970), the Ninth Circuit unequivocally found that the occurrence of DVT on an otherwise unremarkable flight does not constitute an "accident" because, pursuant to this Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), the condition was precipitated not by any unexpected or unusual event or happening but instead by the passenger's own internal reaction to normal aircraft operation.[2] *Id.* at 917.

The Ninth Circuit in *Rodriguez* correctly distinguished this Court's decision in *Husain* on the grounds that it involved a response by the flight crew to the passenger's medical condition, a distinction equally applicable here. *Id.* at 918. Consequently, with respect to an airline passenger's development of DVT under normal flight conditions, the Ninth Circuit held in *Rodriquez* that no "accident" under the Warsaw Convention could have occurred under circumstances such as those presented here. In the present case, the Ninth Circuit below correctly followed its decision in *Rodriguez*.

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[2] Contrary to Petitioner's suggestions, the Ninth Circuit's decision is entirely consistent with this Court's decision in *Air France v. Saks*, and indeed constitutes the exact type of situation contemplated by the Court in *Saks*.

In light of the foregoing, petitioner has failed to show how the Ninth Circuit's decision conflicts with any decision of this Court.

IV. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT

Petitioner asserts that there is a conflict between the Ninth Circuit's decision below and the decisions of other Circuits, but has failed to articulate which other Circuits it is in conflict with, and how the Ninth Circuit's decision is in conflict with those Circuits.

Petitioner attacks the Fifth Circuit's decision in *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004), *cert. denied*, 543 U.S. 1022 (Dec. 6, 2004)(No. 04-541) as being in conflict with the decision of this Court in *Husain* but fails to identify the alleged conflict between the decisions of the Fifth Circuit and Ninth Circuit. In fact, the Ninth Circuit's decision is in accord with the Fifth Circuit's decision in *Blansett*.

In *Blansett*, the Fifth Circuit held that the absence of a DVT warning on a flight governed by the Warsaw Convention was not an "accident" under Article 17 of the Warsaw Convention. *Blansett*, 379 F.3d at 181-82. Here, the Ninth Circuit found that there was no factual basis to support petitioner's claim that Qantas failed to adequately warn him about the danger of developing DVT. Petition for Writ of Certiorari, Appendix at 5a - 6a. Accordingly, there is clearly no conflict between the Fifth Circuit and the Ninth Circuit based on the Ninth's Circuit's decision below and on this ground the petition should be denied.

V. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION COMPORTS WITH THE DECISIONS OF SISTER SIGNATORIES TO THE WARSAW CONVENTION AND THUS FURTHERS THE WARSAW CONVENTION'S GOAL OF UNIFORMITY

With over 120 contracting states, the Warsaw Convention is one of the most widely adhered to treaties in the world, and for more than 70 years the Convention has governed the liability of carriers providing international air transportation throughout the world. The uniform and consistent interpretation and application of the Convention, one of its primary goals, is not only highly desirable but is mandated by this Court. *See El Al Israel Airlines v. Tseng*, 525 U.S. 155, 169 (1999). As stated by the Court, in interpreting the Convention the "opinions of our sister signatories" are "entitled to considerable weight." *Tseng*, 525 U.S. at 176, *quoting Saks*, 470 U.S. at 404.

The courts of England, Canada, Australia and France, have uniformly concluded that the failure to warn of the risk of DVT cannot be an Article 17 "accident." *See DVT Air Travel Group Litigation, [2005] UKHL* 72 (House of Lords); *Povey v. Civil Aviation Safety Authority and Ors*, [2005] HCA 33 (High Court of Australia), available at 2005 WL 1460709; *Gillet v. Air Canada*, Matter 01/10567, Chamber 7/Section 0 (France); *Rynne v. Lauda-Air Luftfarht Aktiengesellschaft*, D5586/2001 (D.C., Queensland, Australia, Feb. 7, 2003); *Van Luin v. KLM Airlines*, No. 10377 of 2001 at ¶50 (D.C., New South Wales, Australia, Oct. 11, 2002); *McDonald v. Korean Air*, No. 01-B30373, 2002 WL 1861837 at ¶17 (Ont. S.C.J. Sept. 18, 2002), *aff'd*, No. C38853 (Ont. C.A. Feb. 18, 2003), *leave to appeal refused*, (2003), 191 O.A.C. 398

(note), 321 N.R. 193 (note), 2003 Carswell Ont 5835, 2003 Carswell Ont 5836 (S.C.C.) (Canada).

What makes the reasoning of these cases all the more compelling is that they refer to and/or adopt the reasoning of this Court in *Saks* to conclude that failure to warn of DVT is not an "accident."

In the recent decision of the House of Lords, the highest court in the United Kingdom, the Court found that DVT suffered by passengers during international transportation was not caused by an "accident" under Article 17. Applying the *Saks* definition of an "accident," Lord Scott held:

> 23. Of more importance for the present purposes is that nothing in the *Husain* case casts doubt upon the two important requirements of an article 17 accident that were established in *Saks* and have been applied fairly consistently ever since, namely, that an event or happening which is no more than the normal operation of the aircraft in normal conditions cannot constitute an article 17 accident and, second, that the event or happening that caused the damage of which complaint is made must be something external to the passenger.
>
> 24. These two requirements appear to me to rule out article 17 recovery in DVT cases where no more can be said than that the cramped seating arrangements in the aircraft were a causative link in the onset of the DVT. The failure by an airline to warn its passengers of the danger of DVT and the precautions that might be taken to guard against that danger does not, in my opinion, improve the case, at least where there is no established practice of airlines

generally or of a defendant airline in particular to issue such warnings.

DVT Air Travel Group Litigation, [2005] UKHL 72 (House of Lords) (December 8, 2005).

Since the Ninth Circuit's decision below comports with the decisions of sister signatories to the Warsaw Convention, the Ninth Circuit's decision furthers the goal of uniformity in the application and interpretation of the Convention as mandated by this Court in *Saks* and *Tseng*. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in all respects.

Dated: June 29, 2006

Respectfully submitted,

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Supreme Court, U.S.
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No. 05-1516

IN THE

Supreme Court of the United States

EDWARD A. BLOTTEAUX, AN INDIVIDUAL,
PETITIONER

v.

QANTAS AIRWAYS LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF

STATEMENT OF ADDITIONAL FACTS

Since 2001, the International Air Transport Association ("IATA") has directed its members to give passengers warnings of Deep Vein Thrombosis ("DVT") risk, and instruct them in ways to avoid developing it during international flights. The Petitioner has testified that, contrary to this industry standard and the Respondent's own corporate policy to give warning information, no DVT warning was given to him during the course of his September 2002 flight.

ISSUE

Does an international carrier's failure to provide its passengers with an industry adopted warning of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, and for which the airline developed but failed to follow procedures for actually providing passengers with such warnings, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

OPPOSITION TO ARGUMENT OF QANTAS AIRLINES

I. THE *RODRIGUEZ* CASE IS NOT IDENTICAL TO THE PRESENT CASE

The claim in *Rodriguez v. Ansett Australia*, 383 F.3d 914 (9th Cir. 2004), arose out of an international flight that occurred in the year 2000. The air carrier's argument was that, at the time of that flight, the industry practice was **not** to warn about DVT risks. In the present case, the Respondent's own developed audio/video programs demonstrate that Qantas had a practice of showing the DVT warning videos on other flights. However, adoption of a program is not sufficient. The air carrier must show that they provided the warning in a way calculated to get to the passengers.

Further, the IATA's pronouncement in 2001 created an industry standard that the Respondent, as an IATA member, had to follow. Thus, the Respondent here diverged from an industry standard and practice by not getting the information to the passengers that its program was supposedly designed to accomplish, while in *Rodriguez*, no standard or practice actually existed. Liability, in turn, should not hinge on the mere availability of information, but instead on whether the safety information actually reached the Petitioner.

II. SUBMISSION OF PETITION ON SIMILAR GROUNDS DOES NOT BAR THE COURT FROM HEARING THE CASE

The Respondent fails to produce any authority for the proposition that Certiorari should be denied merely because the Court previously denied Certiorari in a

similar situation. The Question Presented to the Court, while similar in wording to the Questions Presented in *Rodriguez*, arises in a different context from *Rodriguez*. The incident in Rodriguez occurred, prior to the Respondent or the IATA developing standards requiring DVT warnings. The accident involving the Petitioner occurred after the Respondent and the IATA developed DVT warning requirements, in September 2002.

III. THE NINTH CIRCUIT DID NOT MAKE A FACTUAL DETERMINATION

The Respondent wrongfully assumes that the Ninth Circuit made a factual finding. Merely because Qantas had developed a program to provide DVT warnings, does not mean that the warning ever reached the Petitioner. The Ninth Circuit assumed that adoption of a program was sufficient to comply with the new IATA regulations, and did not consider whether the warning ever reached the Petitioner.

The Ninth Circuit did find that Qantas had video, audio and written materials concerning DVT, a fact that the Petitioner does not dispute. On the contrary, the Petitioner asserts that because Qantas had such materials on hand and did not show them, they diverged from their own, and industry, standard.

Meanwhile, the Ninth Circuit never addressed or inquired into whether the Petitioner was ever provided with the safety information. The mere availability of safety information, among pages of other text and variety of entertainment programs, does not guarantee that the information is dispersed and noted by the flying public, including the Petitioner.

The Ninth Circuit's conclusion that merely developing a program is sufficient to comply with the

standard does not meet the purpose of IATA's direction, as a matter of law. The IATA's goal is to get safety information to the passengers, not merely have airlines develop programs that are not effectively implemented. Thus, Qantas's development of the program does not in and of itself suffice to meet IATA's standards. It is unexpected and unusual for a carrier to develop a program to inform of the risk, but not implement it in a fashion calculated to get to passengers.

IV. PETITIONER'S POSITION IS CONSISTENT WITH THIS COURT'S DECISION IN *HUSAIN*, WHICH ITSELF IS NOT REQUIRED TO BE CONSISTENT WITH INTERNATIONAL LAW

The Court has disapproved the results of international DVT litigation opinions in *Deep Vein Thrombosis and Air Travel Group Litigation* [2003] EWCA Civ. 1005, 2003 WL 21353472 and *Qantas, Ltd. v. Povey* [2005] CA33 2005 WL 450709. This Court, in the *Husain* decision did not interpret the same issue in the treaty in accord to the judgment of the sister signatories. *Olympic Airways v. Husain*, 124 S.Ct. 1221,1230 (2004).

The Court has directly held that a failure to act on information in the carrier's possession that results in an injury is a compensable "accident." *Olympic Airways v. Husain* 124 S.Ct at 1229-30. The decision deliberately stepped away from the decisions of sister signatories, and confirmed "that there is often no distinction between action and inaction on the issue of ultimate liability." *Id.* at 1229. The Court reached this conclusion despite being made aware in the dissent that the decision did not give consideration to how the treaty partners resolved similar legal issues. *Id.* at 1230. The Court should continue to follow its own precedent in determining liability from an

Article 17 "accident."

CONCLUSION

This Court should issue the Writ for Certiorari to the Ninth Circuit Court of Appeals and correct the erroneous decision, in order to protect the safety of international air travelers and to resolve important conflicts between the decision below and the decisions of other Circuits as well as this Court.

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